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ABSTRACT

This paper discusses Supreme Court decisions that have affected the ability of children with disabilities in private schools to receive publicly funded services. First, the court case of Aguilar vs. Felton, which found that Title 1 services provided to educationally deprived children in parochial schools violated the Establishment Clause, is reviewed. The paper then outlines the rights of children with disabilities who attend private schools under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. Finally, the Supreme Court case Agostini vs. Felton, which overruled the Aguilar decision, is analyzed. This court case found that the Title 1 program does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor could the program be viewed as an endorsement of religion. Further legal basis for the Court's decision is provided. (CR)

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Publicly Funded Special Education in Parochial/Private Schools

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Background

New York City provided instructional services funded by Title 1 to parochial students on the premises of the parochial schools since 1966. The city utilized the funds granted under the Title 1 program of the Elementary and Secondary Education Act of 1965 to pay the salaries of public school employees who taught remedial programs in the city's parochial schools. The purpose of the program was to meet the needs of educationally deprived children from low-income families. The programs included remedial reading, reading skills, remedial mathematics, English as a Second Language, and guidance services. The programs were carried out by teachers, counselors, psychologists, psychiatrists, and social workers who volunteered to teach in the parochial schools. The teachers were supervised by field personnel who monitored the Title 1 classes. The administrators of the parochial schools were required to clear the classrooms utilized by public school personnel of all religious symbols.

In 1978, six taxpayers commenced action in the District Court for the Eastern District of New York, alleging that the Title 1 program administered by the City of New York violated the Establishment Clause.

Aquilar vs. Felton

The Supreme Court held that the Title 1 program administered by the City of New York for providing services to educationally deprived children in parochial schools violated the Establishment Clause. The court in handing down its decision stated that the scope and duration of the program required permanent and pervasive state presence in sectarian schools by requiring the city to adopt a system for monitoring the content of the publicly funded Title 1 classes.

The Supreme Court likened *Aquilar vs. Felton* to *School Districts of the City of Grand Rapids vs. Ball* (105 S.Ct. 3216, 87 L.Ed.2d 267) in which classes were provided to private

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school children at public expense in classrooms located in and leased from the private schools. The Court held this to be unconstitutional under the Establishment Clause.

The Court held that the supervisory system established by New York City resulted in excessive entanglement of church and state. The critical elements of entanglement proscribed in *Lemon vs. Kurtzman* (403 U.S. 602, 91S.Ct. 2105, 29 L.Ed2d 745 (1971) were found to exist in *Aquilar vs. Felton*.. The basis for such entanglement rested on the premise that Title 1 aid was provided in a pervasively sectarian environment and that such assistance required ongoing inspection to ensure the absence of a religious message.

"Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and the constitutional principles that they implicate- that neither the State nor Federal Government shall promote or hinder a particular faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits."

Justice O'Connor dissented. She stated that the holding rested on a theory from *Meek vs. Pittneger*, (421 U.S. 349, 367-373, 95 S.Ct. 1753, 1764-1767, 44 :.Ed.2d 217 (1975) that public school teachers who were on parochial school premises would likely bring religion into their classes. Therefore, supervision necessary to prevent religious training would unduly entangle church and state. "Even if this theory were valid in the abstract, it cannot be validly applied to New York City's 19 year old Title I program. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and State. I would uphold Congress' efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools."

The New York Title 1 program was deemed unconstitutional because it failed the third part of the Lemon test. O'Connor disagreed with the Courts analysis of entanglement and pointed to the fact that there was never one incident of any Title 1 instructor attempting to subtly or overtly indoctrinate students in religious tenets at public expense. O'Connor poignantly went on to

describe the basis for Title 1 programs and the benefits that have ensued. In closing she stated that the ruling did not spell the end of Title 1 programs for disadvantaged children since they may receive services off the premises of their schools. However, "the only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country. For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public schoolteachers are likely to start teaching religion merely because they have walked across the threshold of a parochial school."

1985-present

In the years since the Felton decision school districts have relied heavily on mobile classrooms parked near the grounds of religious schools and transportation reimbursement for families in order to provide Title 1 services to these students. One mobile classroom alone costs approximately $100,000 a year to lease and operate. New York City has had to lease close to 126 mobile classrooms in order to serve 22,000 religious school children who meet eligibility for services under Title 1. The mobile classrooms besides being costly are cramped, noisy, and lack bathroom facilities. In addition, several thousands of students are still not serviced under Title 1 in various cities and towns throughout the country due to the Felton decision.

IDEA, Section 504 and ADA

IDEA requires that public schools make special education and related services available to all children regardless if they attend a private or parochial school. Section 504 of the Rehabilitation Act requires that there be no discrimination to children who do not attend public schools in receiving the benefits of programs that are federally funded. The ADA mandates reasonable modifications and adheres to the least restrictive principle of IDEA. The ADA also provides that programs need not provide accomodations that present an undue burden (Rothstein, 1995).

The Aquilar vs. Felton decision required that educational programs for the disadvantaged be provided at a neutral site. This created the inference that special education services under IDEA also needed to be provided at a neutral site. It also meant that programs which came under Section 504 and ADA needed to be provided at a neutral site.

The cost to provide these services over the years since the Felton decision have led in many instances to disadvantaged children not receiving the full remedial services that they required.

Agostini vs. Felton

In 1995 the New York City Board of Education and parents of parochial school students filed a Rule 60(b) motion in district court seeking a review of the Aquilar decision. Rule 60(b) of the Federal Rules of Civil Procedure provides that a " court may relieve a party...from final judgment...if...an earlier judgment upon which it is based has been reversed...or it is no longer equitable that the judgment should have prospective application."

On June 23rd, 1997 in a 5-4 vote the Court overruled its decision in Aquilar vs. Felton.

The Court held:

1. A federally funded program providing supplemental, remedial instruction to disadvantaged children on an neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those present in New York Title 1's program. Therefore, Aquilar, as well as a portion of its companion case, School District of Grand Rapids v. Ball, 473 U.S. 373, are no longer good law.

a. Rule 60(b) states that the court may relieve a party...from final judgment...when it is no longer equitable that the judgment should have prospective application--authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Since the excess costs of complying with the injunction were know when Aquilar was decided they do no constitute a change in factual conditions. Therefore satisfaction of Rule 60 (b) hinges on whether the Court's later Establishment Clause cases have so undermined Aquilar that it is no longer good law.

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b. The Court's most recent cases have undermined the assumption under which Aquilar and Ball rests. Contrary to Aquilar's conclusion, placing full time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. Subsequent cases have modified the approach the Court uses to assess whether the government has advanced religion by inculcating religious beliefs.

First, the Court has abandoned Ball's presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. (Zobrest vs. Catalina Foothills School District, 509 U.S. 1, 12-13). There has never been evidence that any New York City instructor teaching on parochial school premises attempted to inculcate religion in students.

Second, the Court has departed from Ball's rule that all government aid that directly aids the educational function of religious schools is invalid. The provision of instructional services is indistinguishable from the provision of a sign-language interpreter I n Zobrest.

Third, New York City's Title 1 program does not give aid recipients any incentive to modify their religious beliefs or practices in order to obtain program services. Although Aquilar and Ball completely this consideration, other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its recipients to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Such an incentive is not present here. The aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavors religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis.

Fourth, Aquilar erred in concluding that New York City's Title 1 program resulted in an excessive entanglement between church and state. Aquilar's finding of excessive entanglement rested on three grounds 1.the program would require pervasive monitoring by public authorities, to ensure that Title 1 employees did not inculcate religion. 2.the program required administrative cooperation, between the government and parochial schools and 3. the program might increase the dangers of political divisiveness.

Under the Court's current Establishment Clause understanding, the last two considerations are insufficient to create an "excessive entanglement," because they are present no matter where Title 1 services are offered and no court has held that Title 1 services cannot be offered off-campus. In Zobrest the Court abandoned the presumption that public employees will inculcate religion simply because they happen to be in a sectarian environment, therefore there is no longer any need to assume that pervasive monitoring of Title teachings required. There is no evidence that the system New York City has in place to monitor Title 1 employees is insufficient to prevent or to detect inculcation. The Court has failed to find excessive entanglement in cases involving more onerous burdens on religious institutions (Bowen vs. Kendrick, 487, U.S. 589, 615-617)

Therefore, New York City's Title 1 program does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor can this carefully constrained program be reasonably viewed as an endorsement of religion.

The stare decisis doctrine does not preclude this Court from recognizing the change in its law and overruling Aquilar and those portions of Ball that are inconsistent with its more recent decisions. The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather lower courts should follow the case which directly controls, leaving to this Court he prerogative of overruling its own decisions.

Legal Basis For Decision

The Court first found that Rule 60(b) allowed the parties to bring action to challenge Aquilar. The Court, then in light of the holdings in Zobrest, ruled that the decision in Aquilar was no longer good law. The Court rejected three presumptions that it previously relied on to support a number of its rulings: 1. that permitting public school employees to work within religious schools inevitably results in the state sponsored indoctrination of religion; 2. that permitting public employees to work within religiou s schools necessarily constitutes symbolic union between church and state; and 3. that any government aid that enhances the educational function of religious schools impermissibly violates the separation between church and state.

Importance of the Case

The Court in rejecting these presumptions, changed its approach to the Establishment Clause cases. The Court's approach now appears to focus on the actual, rather than the potential, effect of government programs. If programs actually result in state sponsored religious indoctrination they will violate the First Amendment. Programs that create only the possibility of such indoctrination, however, will not apparently violate the First Amendment. The Court did not replace the rejected presumptions with new rules leaving the full effect of this new Establishment Clause jurisprudence not known for some time.